

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 5, 2002

IN RE:

PETITION OF XO TENNESSEE, INC. TO OPEN  
A CONTESTED CASE PROCEEDING TO  
MONITOR COMPLIANCE WITH TRA RULES  
AND ORDERS ON DIRECTORY COVERS

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DOCKET NO.  
02-01106

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ORDER ESTABLISHING PROCEDURAL SCHEDULE AND  
DENYING JOINT MOTION FOR INTERIM RULING

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This matter is before the Pre-Hearing Officer on the *Joint Motion for Interim Ruling* filed by BellSouth Advertising & Publishing Corporation ("BAPCO"), US LEC of Tennessee, Inc. ("US LEC") and XO Tennessee, Inc. ("XO"). The Motion requests that the panel of Directors assigned to this docket accept briefs and hear argument at the Authority Conference on December 16, 2002 on the following issue:

"How should the Authority arrive at a just and reasonable price which a competing local exchange carrier ("CLEC") would be required to pay in order to place its name and logo on the cover of the white pages published by, or at the direction of, an incumbent local exchange carrier?"

**Background**

On October 2, 2002, XO filed its *Petition of XO Tennessee, Inc. to Open a Contested Case Proceeding to Monitor Compliance with TRA Rules and Orders on Directory Covers*. XO requested the panel to open a contested case and appoint a Pre-Hearing Officer to assure compliance with the recent Supreme Court opinion, *BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W.3d 506

(Tenn. 2002) (“the “*BAPCO* opinion”), with regard to the Nashville white pages telephone directory. XO alleged that publication of the book was imminent. On October 10, 2002, BAPCO filed a Response to the Petition, opposing the convening of a contested case on the grounds that BAPCO was complying with all applicable orders and, in any event, the Authority’s involvement could create a disincentive to negotiate in good faith. On October 14, 2002, US LEC moved to intervene.

At a regularly scheduled Authority Conference on October 21, 2002, the panel unanimously voted to convene a contested case and appointed a mediator to oversee negotiations. The Motion to Intervene, which was unopposed, was granted.

On October 28, 2002, the Authority issued a Notice scheduling a Hearing in this matter. On October 29, 2002, the parties filed a *Motion to Suspend Proceeding* which asserted that they had reached a settlement of all issues concerning the terms and conditions under which the requesting CLECs’ logos would appear on the cover of the 2003 white pages directories for Nashville and Knoxville. The Motion stated that “[t]hese terms and conditions have been agreed to solely for the purpose of settlement regarding the Nashville and Knoxville directories and are not intended to establish a precedent concerning other directories.” A Notice canceling the Hearing was issued on October 29, 2002. The Motion asked that no action be taken by the Authority in this docket unless otherwise requested by a party. The panel granted the Motion at the November 4, 2002 Authority Conference.

On November 25, 2002, XO filed the *Motion to Restart Proceedings*, asserting that the parties could not reach an agreement regarding the inclusion of its name and logo on the cover of BAPCO’s 2003 white pages directory for Memphis. The Motion stated

that the issues must be resolved by December 31, 2002 to avoid delaying the publication and distribution of the directory. The Motion requested that a Pre-Hearing Conference be convened and an expedited procedural schedule be established. At the December 2, 2002 Authority Conference, the panel appointed General Counsel or his designee as Pre-Hearing Officer to prepare the docket for a Hearing.

### **The December 3, 2002 Pre-Hearing Conference**

A Pre-Hearing Conference was held on December 3, 2002 by agreement of the parties. In attendance at the December 3, 2002 Pre-Hearing Conference were:

BellSouth Advertising & Publishing Corporation – **Guilford F. Thornton, Jr., Esq.**, Stokes, Bartholomew, Evans & Petree, 424 Church Street, Suite 2800, Nashville, TN 37219;

US LEC of Tennessee, Inc. and XO Tennessee, Inc. -- **Henry Walker, Esq.**, Boulton, Cummings, Connors & Berry, 414 Union St., No. 1600, Nashville, TN 37219.

During the Pre-Hearing Conference, the parties acknowledged that the sole issue of determining a just and reasonable rate remained to be resolved in this proceeding. The parties further acknowledged that the official publishing deadline for the Memphis directory is January 1, 2003, with a built-in lag-time of one (1) month. Thus, the actual deadline for resolving the issue is February 1, 2003.

During a discussion of the procedural schedule, the parties jointly requested that the Pre-Hearing Officer bifurcate these proceedings and schedule a Hearing solely on the methodology the panel would utilize to reach a just and reasonable rate. The parties indicated that they would be more likely to reach a settlement on the rate if the panel preliminarily determined whether BAPCO could charge a price that is market-driven, *i.e.*, derived from other directory advertising rates and determined primarily by the private

negotiations of parties, or is based upon cost and public policy considerations. BAPCO advocates the market-driven, advertising-based methodology and the Petitioners support the cost and policy-based methodology. The Pre-Hearing Officer took this proposal under advisement.

After conferring with the parties, the Pre-Hearing Officer established the following procedural schedule, with the understanding that revisions would be appropriate in the event that their proposal regarding an expedited decision on the methodology the panel would employ to determine a just and reasonable rate is adopted:

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#### **Procedural Schedule**

Proposed Protective Order	Friday, December 6, 2002
Discovery Requests	Tuesday, December 10, 2002
Objections	Friday, December 13, 2002
Discovery Responses	Thursday, December 19, 2002
Motions to Compel	Friday, December 20, 2002
Pre-filed Direct Testimony	January 3, 2003
Hearing Date	January 7-8, 2003

#### **Joint Motion for Interim Ruling**

The parties memorialized their proposal for an expedited decision on the methodology to be used to determine a just and reasonable rate in the *Joint Motion for Interim Ruling* filed on December 4, 2002. Therein, the parties jointly framed the issue as follows:

How should the Authority arrive at a just and reasonable price which a competing local exchange carrier ("CLEC") would be required to pay in order to place its name and logo on the cover of the white pages published by, or at the direction of, an incumbent local exchange carrier?

The parties also agreed that the choice of methodology was a matter of law and policy, not of fact, and agreed that they were aware of no disputed facts relevant to the determination of the issue.

The parties' cooperation and professionalism in agreeing on an issue and expeditiously filing their joint Motion is commendable and appreciated. So too, is their desire to reach a settlement of this matter, which they previously accomplished with regard to the Nashville and Knoxville directory covers.

Nevertheless, these proceedings were re-convened at XO's request because the parties were admittedly at a stalemate on the issue of setting a just and reasonable rate for the appearance of Petitioners' names and logos on the cover of the 2003 white pages directory for Memphis. The parties have had multiple opportunities to settle this matter in its entirety. The panel appointed a mediator to assist with negotiations. In the midst of reaching an agreement with regard to the Nashville and Knoxville directory covers, the parties knew that the price for the covers of the Memphis and Chattanooga directories remained unresolved. While settlement of this matter is desirable, this docket was reconvened, not to facilitate settlement negotiations, but to set a just and reasonable rate.

Moreover, at XO's request, these proceedings will be expedited. Expediting this proceeding is appropriate due to the impending publication deadline for the Memphis directory and the financial condition of certain CLECs, which renders them legally incapable of incurring a financial obligation without knowledge of its exact amount. Thus, publication of the directory with the Petitioners' names and logos thereon, subject

to a true-up at a later date without resolving the issue of price, is not an optimum resolution of this matter.

While preliminary resolution of the issue of the methodology for establishing a rate may facilitate settlement, it is not in the best interest of the Authority to utilize this approach. The focus of this docket goes beyond methodology. The Petition seeks the Authority's involvement to assure compliance with the Tennessee Supreme Court's decision in the *BAPCO* case. The *BAPCO* case holds that the Authority has the jurisdiction and authority to compel BAPCO to provide CLECs with the opportunity to contract for the appearance of their names and logos on the cover of the white pages directories under the same terms and conditions as BAPCO provides to BellSouth, and such terms and conditions must be offered "in a just and reasonable manner."<sup>1</sup> Thus, the issue might more properly be framed as follows:

What is a just and reasonable price which a competing local exchange carrier would be required to pay in order to place its name and logo on the cover of the white pages published by, or at the direction of, an incumbent local exchange carrier?

To facilitate a decision on this issue under the existing Procedural Schedule, each party shall present Pre-filed Direct Testimony that:

1. States a proposed rate with specificity;
2. Provides a methodology supporting the proposed rate with justification;
3. Identifies all inputs used to calculate the rate along with supporting documentation to verify the accuracy of such inputs; and
4. Is provided by a person who can fully address all aspects of the proposed rate,

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<sup>1</sup> *BAPCO*, 79 S.W.3d at 510, 522.

including the methodology and justification, consistent with Authority Orders and due process.<sup>2</sup>

The parties may present rebuttal testimony, with evidentiary support, at the Hearing. At that time, the parties and the panel will be afforded the opportunity to question the witnesses. This approach allows the panel to thoroughly examine the evidentiary basis for each position before deciding on a just and reasonable rate.

In their joint Motion, the parties are proposing to shift the burden to the panel to make a decision on methodology in a vacuum, without knowledge of the parties' proposed rates or evidence in support thereof. It is not beyond the realm of possibility that a just and reasonable rate could include considerations of both cost and market, as well as many other factors such as the state of competition and the possibility of consumer confusion.<sup>3</sup> Such factors do present issues of fact for determination by the panel. Thus, deciding between the two options presented in the joint Motion is unnecessary and could actually limit the panel's discretion and ability to determine a just and reasonable rate.

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<sup>2</sup> See *Consumer Advocate v. Tennessee Regulatory Authority*, No. 01A01-9606-BC-00286, 1997 WL 92079 (Tenn. Ct. App., March 5, 1997) (no Tenn. R. App. P. 11 application filed), which states:

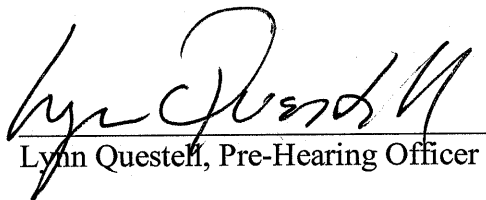
It is elementary that administrative agencies are permitted to consider evidence which, in a court of law, would be excluded[,] under the liberal practice of administrative agencies. Almost any matter relevant to the pending issue may be considered, provided interested parties are given adequate notice of the matter to be considered and **full opportunity to interrogate, cross-examine and impeach the source of information and to contradict the information.** (emphasis added).

See also *Docket to Determine Compliance of BellSouth's Operations Support System with State and Federal Regulations*, TRA Docket No. 01-00362 (*Order Resolving Procedural Motions*) (issued November 14, 2002) p. 16.

<sup>3</sup> It should be noted that in the *BAPCO* opinion, the Tennessee Supreme Court analyzed the directory cover issue in terms of the government's interest in preventing deception of customers and in advancing "competition in the provision of local services by effectively informing consumers as to the existence of alternative local telephone services" rather than in terms of advertising. *BAPCO* at 520. It was under this analysis that the Court determined that the TRA's rulings on the directory covers were valid under the First Amendment. *Id.* at 521.

**IT IS THEREFORE ORDERED THAT:**

1. The Procedural Schedule as set forth in this Order is hereby adopted.
2. Each party shall present Pre-filed Direct Testimony that:
  - a. States a proposed rate with specificity;
  - b. Provides a methodology supporting the proposed rate with justification;
  - c.. Identifies all inputs used to calculate the rate along with supporting documentation to verify the accuracy of such inputs; and
  - d. Is provided by a person who can fully address all aspects of the proposed rate, including the methodology and justification, consistent with Authority Orders and due process.
3. The *Joint Motion for Interim Ruling* filed by BellSouth Advertising & Publishing Corporation, US LEC of Tennessee, Inc. and XO Tennessee, Inc. is denied.

  
Lynn Questell, Pre-Hearing Officer